

the third defendants the writ of seizure and sale in fact automatically stood set aside and the third defendants then became immediately entitled to get back the sum of \$5,600 from the plaintiffs. In fact, in view of the judgment of the Federal Court, it was not necessary for me at all to go into all the reasoning or the merits of the application made before me by the third defendants.

Order accordingly.

Solicitors: D. A. Devadason; Shearn, Delamore & Co.

PORT SWETTENHAM AUTHORITY v. SHARIKAT LEE HENG SDN. BHD.

[A.C.J. (Abdul Hamid J.) October 21, 1970]

[Kuala Lumpur — Civil Appeal No. 4 of 1970]

Bailment — Liability of port authority as bailee — Loss of goods — Res ipsa loquitur — Burden of proof — Port Swettenham Authority By-Laws, 1965, r. 91(1).

Port Authority — Bailment — Liability as bailee — Port Swettenham Authority By-Laws, 1965, r. 91(1).

This was an appeal against the judgment of the learned magistrate ordering the appellant to pay a sum of \$936 in respect of a claim by the respondents. The respondent's claim was in respect of the value of one case of locksets lost while in the custody and possession of the appellants. The learned magistrate held that as the appellant was a bailee, mere proof of loss by respondent was sufficient by invoking the doctrine *res ipsa loquitur* to show that the appellant was negligent thus placing the burden upon the appellant to show absence of negligence on its part.

Held, allowing the appeal: (1) it is clear from the language of rule 91(1) of the Port Authority By-Laws that in exercising its statutory functions with regard to the storage of goods, the authority is not liable for loss of goods in its custody unless actual fault is established;

(2) the burden of proof in this case therefore, unlike the position at common law, is cast upon the respondents and as they had failed to discharge this burden of proof, judgment should have been given against them.

Cases referred to:-

- (1) *Morris v. C.W. Martin* [1965] 2 All E.R. 725 at p. 731.
- (2) *Abdul Rahman v. Ariffin* [1956] M.L.J. 89.
- (3) *Gee Hup & Co. v. Chop Yong Pee Huat* [1935] M.L.J. 66.
- (4) *J. Spurling Ltd. v. Bradshaw* [1956] 2 All E.R. 121 at p. 125.
- (5) *Canada Steamship Lines Ltd. v. The King* [1952] A.C. 192 at p. 208.
- (6) *H.C. Smith Ltd. v. Great Western Rly Co.* [1922] 1 A.C. 178.
- (7) *Harris v. Great Western Rly. Co.* (1876) 1 Q.B.D. 515.
- (8) *Gibund v. Great Eastern Rly. Co.* [1921] 2 K.B. 426.
- (9) *Turner v. Civil Service Supply Association Ltd.* [1926] 1 K.B. 50.

CIVIL APPEAL.

Abdullah bin Yusoff for the appellant.

P. Cumaraswamy for the respondents.

Abdul Hamid J.: This was an appeal against the judgment of the learned magistrate of Kuala Lumpur

A ordering the appellant to pay a sum of \$936 with interest at 6% and costs in respect of the claim made by the respondents.

The respondents, Sharikat Lee Heng Sdn. Bhd on 14th November, 1969 issued a summons in the magistrate's court, Kuala Lumpur, against the appellant, Port Swettenham Authority, to recover a sum of \$936 being the value of one case containing 180 pieces of locksets lost while in the custody and possession of the appellant. The respondents were the consignees of goods namely four cases of locksets shipped and loaded ex s.s. "Myrmidon" at Liverpool, United Kingdom for Kuala Lumpur via Port Swettenham. The four cases of locksets were discharged from the ship and kept in the custody of the appellant at the warehouse for delivery to the respondents. When the respondents called at the port to take delivery, only three cases were delivered. One case was lost and could not be traced.

The respondents alleged that the said one case was lost as a result of negligence of the appellant or their servants or agents and also relied on the doctrine of *res ipsa loquitur*.

The appellant in its defence denied receiving four cases and further sought the protection under rule 91(1) of the Port Swettenham Authority By-Laws, 1965

On the evidence the learned magistrate quite rightly concluded that the four cases of locksets were delivered to the custody of the appellant. The only ground which requires consideration is whether the learned magistrate was right in holding that mere proof of loss by the plaintiffs/respondents was sufficient, by invoking the doctrine of *res ipsa loquitur*, to show that the appellant was negligent placing thereby the burden upon the appellant to show absence of negligence on its part.

Mr. Cumaraswamy, counsel for the respondents, submitted that the appellant was a bailee for reward and that the common law rule with regard to a claim by a bailor from a bailee under a contract of bailment applies. He cited the case of *Morris v. C. W. Martin*⁽¹⁾ where Lord Denning M.R. said —

"(iii) *Bailment for reward*. Once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe; and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show, that the loss or damage occurred without any neglect or default or misconduct of himself or of any of his servants or agents to whom he delegated his duty."

He then referred to the case of *Abdul Rahman v. Ariffin*⁽²⁾ where Thomson J. (as he then was) found nothing inconsistent between the common law principle and sections 104 and 106 of the Contracts (Malay States) Ordinance, 1950. And referring to the case of *Gee Hup & Co. v. Chop Yong Pee Huat*⁽³⁾ it is submitted that the Court of Appeal held that it was not necessary for the bailor to prove *prima facie* negligence even though he had pleaded negligence. Mr. Cumaraswamy also drew my attention to the case of *J. Spurling v. Bradshaw*⁽⁴⁾ where Denning L.J. (as he then was) said —

"A bailor, by pleading and presenting his case properly, can always put the burden of proof on the bailee. In the case

of non-delivery, for instance, all he need plead is the contract and the failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exempting clause."

See also *Houghland v. R. R. Low (Luxury Coaches) Ltd.* [1962] 1 Q.B. 694 (per Omerod L.J. at p. 698 and Willmer L.J. at p. 700).

Mr. Cumaraswamy went on to say that a bailee may limit or relieve himself of his common law liability but he must do so in clear and unequivocal language. If there is ambiguity in the meaning and intents of such a limitation or exclusion it will be construed in a sense favourable to the bailor. He then referred to the *contra proferentem* rule and the principles laid down in the Privy Council case, *Canada Steamship Lines Ltd. v. The King*.⁽⁵⁾

Referring to rule 91(1), it is submitted that the issue is not whether the appellant is exempted from liability to the respondents but whether the rule has ousted the operation of the common law rule on onus of proof in bailment cases. It is contended that rule 91(1) should be construed as an acceptance of liability for loss due to negligence or misconduct. That liability may only be avoided if the negligence or misconduct was not the sole cause of the loss. It is further contended that as a matter of general law, it is for the appellant to show that its negligence was not the sole cause of the loss.

Enche Abdullah, counsel for the appellant, submitted that it is for the respondents to prove negligence and not merely loss. He referred to the case of *H. C. Smith Ltd. v. Great Western Railway Company*⁽⁶⁾ and three other Indian cases all of which dealt with carriage of goods on railways. In my view, these cases are not very helpful for purposes of determining the issue under consideration.

In my deliberation I have reviewed a number of cases on bailment for reward but none of these cases seems to be on all fours with the present case. I think much depends ultimately on the construction of rule 91(1) of the Port Swettenham Authority By-Laws, 1965.

In ordinary cases of bailment for reward —

"The bailee may exempt himself from his common law duty by special conditions in the contract, but the exempting words must be express, unambiguous and adequate in all circumstances since they will be construed strictly against the bailee." [Paragraph 173 *Chitty on Contracts* Vol. II 22nd ed.].

In the present case it has to be borne in mind that the Port Authority has been established under an Act of Parliament (Port Authorities Act 1963). The Act confers certain statutory functions on the authority for purposes of operating and maintaining a port and do all things reasonably necessary for or incidental to the discharge of its functions. The authority is a quasi government body established for the purpose of carrying out its activities essential to the smooth running of its functions, for example shipment and storage of goods brought into or to be sent out from this country, concerning which there may not be any written contract between the consignee or consignor and the authority. It is perhaps for that reason that the law pro-

vides that the rule may be made to protect itself from certain liabilities. Rule 91(1) apparently is designed to limit the liability of the authority for loss of goods without actual fault of the authority, its officers or servants. In the absence of any contract the obligation of the authority should I think be subject to its statutory limitation. This should to my mind constitute notice of the authority's limitation as to liability and form the basis upon which its obligation is performed.

I have considered the case of *Canada Steamship Lines Ltd. v. The King*, *supra*, cited by Mr. Cumaraswamy. In that case there was negligence on the part of the Crown's servants. The fire broke out in the shed where goods were stored destroying all contents. The Crown pleaded that the appellant's company's claim was barred by clause 7 of a lease by which the Crown leased a freight shed to the appellant company providing that —

"The lessee shall not ... have any claim ... against the lessor for ... damage ... to ... goods ... being in the said shed,..."

It was held that —

"The Crown had failed in clause 7 to limit its liability in respect of negligence in clear terms, and that accordingly, on the principle stated in *Alderslade v Hendon Laundry, Ltd.* [1945] K.B. 189 at 192 which appeared not to be in conflict with the law of Lower Canada, the clause was to be construed as relating to a liability not based on negligence,..."

There the Crown sought to protect liability from negligent act and it is also clear that the decision rested on the construction of various clauses in the lease read in the light of the lease read as a whole. The question that calls for determination here is whether the goods in the present case may be taken to have been stored subject to the Port Swettenham Authority By-Laws and if so whether the liability of the authority exists only where actual negligence on its part or the part of its officers or servants is established. (See *Harris v. G. W. Rly.*⁽⁷⁾ followed in *Giband v. G. E. Rly.*⁽⁸⁾ see also *Turner v. Civil Service Supply Association Ltd.*⁽⁹⁾).

Section 3 of the Port Authorities Act deals with functions of the authority. It is expressly provided under paragraph (b) of subsection (2) of section 3 as follows —

"(b) to undertake all or any work of every description of or in connection with the loading, unloading and storing of goods or cargo in the port, ... subject to such regulations or by-laws as the authority may from time to time make,..."

It seems clear from this provision that the exercise of such function by the authority is intended to be subject to the regulations or by-laws made under the Act. That intention is also evident from the other provisions, in particular section 29(1)(g) of the Act pursuant to which rule 91(1) was made. It reads —

"The authority may with the approval of the Minister make by-laws for —

(g) limiting the liability of the authority in respect of any loss, damage or injury to any person, occurring without the actual fault or privity of the authority (whether in any vessel operated or maintained by them or on any wharf, quay or other part of the port);"

The authority is empowered to make rules, with the Minister's approval, limiting the liability of the authority. The legislature has also laid special emphasis on the words "without actual fault of the

authority". This provision read in the light of rule 91(1) makes it sufficiently clear that the intention is not only to exempt the liability of the authority from mere loss but to affirm that the authority will only be liable for such loss if actual fault is established.

Earlier on I referred to the position at common law concerning the exemption from liability. And I also said that in the absence of any special terms in a contract any dealing with the authority should be on the basis of the provisions in the Act and by-laws appertaining to such authority. Therefore in considering this issue it may be necessary in order to arrive at a proper interpretation to apply the basic principles relating to construction of exemption clauses. In *Chitty on Contracts* — General Principles paragraph 693 Vol. I, 22nd ed. it is stated that —

"Exemption clauses must be expressed clearly and without ambiguity or they will be disregarded. Mere general words in an exemption clause do not ordinarily absolve the party seeking to rely on the exemption from liability for his own negligence or that of his servants. The clause must clearly express what its intention is."

And in paragraph 694 it is further stated that —

"Each clause must be considered according to its actual wording, but it must clearly extend to the exact contingency which has occurred."

Further under paragraph 697 the learned author dealing with the effect of exclusion said —

"Liability for negligence may be effectively excluded if words are used which indicate that all damage, however caused, is to be comprehended within the exemption, or which throw the risk upon the plaintiff."

In the instant case after considering the provision of the Act I am forced to the conclusion that it is the intention of the legislature that in exercising its statutory functions with regard to storage of goods the authority shall not be liable for loss of any goods in its custody unless actual fault is established. Such an intention is I think revealed from the clear language used in rule 91(1). This rule seems to emphasize that —

"The authority shall not be liable for any loss ... arising from ... misdelivery ... of goods or from any other cause, unless such loss, ... has been caused solely by the ... negligence of the authority or its officers or servants."

The language used seems to produce the effect that proof of mere loss is insufficient to establish a case for the claimant though it may be sufficient at common law. For that reason it is my view that to succeed a claimant must not only show mere loss of any goods while in custody of the authority, he must also prove that the loss was due to the negligence of the authority, its officers or servants.

In the instant case it is my considered opinion that the appellant is entitled to rely on this rule and for the respondents to succeed there must be proof of not only mere loss in the custody of the appellant but that such loss was caused solely by the negligence of the appellant, its officers or servants. The burden of proof unlike the position at common law by reason of rule 91(1), is cast upon the respondents.

For these reasons it is my judgment that this appeal should be allowed. The order of the learned

magistrate is hereby set aside. The appellant shall be entitled to costs of this appeal and in the court below.

Appeal allowed.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

B

SEAH CHOON CHYE v. SARASWATHY DEVI

[O.C.J. (Syed Agil Barakbah J.) October 22, 1970]

[Seremban — Originating Motion No. 88 of 1969]

Practice and Procedure — Application to enforce undertaking by solicitor — Application by originating motion — Disputed questions of facts — Allegations of fraud and implied misconduct — Application should be made by writ.

Advocates and Solicitors — Solicitor's undertaking — Application for enforcement — Disputed questions of facts — Allegations of fraud and implied misconduct — Procedure.

This was an application by way of originating motion for an order that a date be fixed by the court within which an undertaking given by the respondent, a solicitor, to the applicant, can be completed. The main issue in the case was whether the application by way of originating motion is proper or whether it should be made by way of writ.

Held: as in this case there were disputed questions of facts and allegations of fraud and misconduct, the application should be commenced by writ.

E Cases referred to:-

- (1) *United Mining and Finance Corporation Ltd. v. Becher* [1910] 2 K.B. 296, 307.
- (2) *Yap Hong Thin & Anor. v. Seenevasam* [1970] 1 M.L.J. 143.
- (3) *Nanyang Development (1966) Sdn. Bhd. v. How Swee Poh* [1969] 1 M.L.J. 232.
- (4) *In re Marchant* [1908] 1 K.B. 998.
- (5) *Ratna Ammal v. Tan Chow Soo* [1967] 1 M.L.J. 296.
- (6) *Nederlandsche Handel-Matschappij N.V. (Netherlands Trading Society) v. Koh Kim Guan* [1959] M.L.J. 173, 175.
- (7) *Brendon v. Spiro* [1937] 2 All E.R. 496.
- (8) *Ng Wan Siew v. Teoh Sin* [1963] M.L.J. 103.
- (9) *Hill v. Fletcher* (1850) 155 E.R. 205.

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ORIGINATING MOTION.

Wong Seng Chow for the applicant.

N. Ramachandran for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an application by way of originating motion for an order that a date be fixed by the court within which an undertaking dated the 9th day of January, 1968, given by the respondent, Saraswathy Devi, to the applicant, Seah Choon Chye, can be completed. A copy of the said undertaking was filed together with the applicant's affidavit. The respondent gave the undertaking in her capacity as an advocate and solicitor, to release the transfer signed and delivered to her by her client, K. Murugasu, to one Michael Chong Ngian Fong together with twenty-six certificates of titles charged to the Great Eastern Assurance Co. Ltd., Singapore. The release was to take effect on receipt by the respondent of documents relating to various assignments and the fulfilment of